NINETY-SECOND SESSION

***In re* Franks (No. 5)** **Judgment No. 2079**

The Administrative Tribunal,

Considering the fifth complaint filed by Mr Nigel Malcolm Franks against the European Patent Organisation (EPO) on 27 November 2000, the complainant's additional submissions dated 6 January 2001 and submitted on 19 January, the EPO's reply of 19 March, the complainant's rejoinder of 19 April and the Organisation's surrejoinder of 20 July 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a British citizen who was born in 1961. At the material time he was a search examiner at the European Patent Office, the EPO's secretariat. He held grade A3 and was a member of the local Staff Committee.

Owing to an illness, diagnosed as repetitive strain injury, the complainant had been fully or partly unfit for work since June 1997. A report issued by the Office's medical officer on 24 November 1998 declared him 75 per cent fit for work provided he did not have to use his hands. The same day, the complainant wrote to the President of the Office explaining that the only work he could do was staff representation work, but because EPO policy restricted such activities to 50 per cent of normal working hours he had only been working half-time. He sought authorisation to devote 75 per cent of office time to Staff Committee work. In the event that his request was not allowed he asked that his letter be considered as an internal appeal. This appeal was subsequently taken up by the Appeals Committee under the reference RI/121/98.

Meanwhile the medical officer issued a further report on his case on 27 January 1999. As a result of that report, on 28 January the Office placed the complainant on compulsory sick leave until further notice. That decision affected the date at which his statutory period of sick leave on full pay under Article 62(6) ended and extended sick leave under Article 62(7) began. That the complainant was completely unfit for work from 2 March 1999 is not in dispute.

By a notification of 6 April 1999 a personnel officer informed the complainant that on 16 April he would reach the maximum period of sick leave on full pay and that from 17 April he would be on extended sick leave, would receive only half of his basic salary and would no longer be entitled to advancement or annual or home leave. He went on to say that if it appeared that the complainant's incapacity was the result of a "serious illness" as defined in Article 62(7) he would retain entitlement to the whole of his basic salary. He also gave him the name of the doctor appointed by the Office to the Invalidity Committee and asked him to let the Office know which doctor he appointed.

The complainant lodged two more internal appeals. In one, dated 27 April 1999 and registered under the reference RI/62/99, he sought the quashing of the Office's decision to put him on compulsory sick leave. In the other, dated 3 July 1999 and registered as RI/79/99, he challenged the decision to place him on extended sick leave from 17 April and wanted the Office to make good the financial loss he had suffered since that date.

A report of the Invalidity Committee, dated 6 March 2000, indicated that the complainant was considered to be suffering from a disability comparable to a severe illness. The medical practitioner appointed by the Office did not sign the report.

In its report of 5 July 2000 the Appeals Committee recommended rejecting the first appeal as being devoid of

substance on the grounds that the complainant had been found to be 100 per cent unfit for work as from 2 March 1999. New rules on the time allocated to staff representation work had come in on 1 July 1999 and it served no purpose in law to clarify how much time he could have devoted to such activities under the old rules. It recommended partially allowing the other two appeals. It took the view that the decision to place the complainant on compulsory sick leave was unlawful and he was due compensation for material injury. It recommended recalculating the date at which his maximum period of sick leave on full pay ended. The President endorsed the Committee's recommendations. In a decision dated 29 August 2000 he told the complainant that the date marking the beginning of his extended sick leave had been changed from 17 April 1999 to 11 May, and the Office would refund the part of his salary erroneously withheld, plus interest. That is the decision the complainant impugns.

In a fax of 6 September 2000 to the President the complainant asked when he could resume work. In a reply of 10 October the President told him that only the Invalidity Committee could decide. On 17 November he received a copy of another report from the Invalidity Committee in which, this time, two of the three members found that the disability he was suffering from was not comparable to a severe illness. As a result of that report, on 20 November the Office informed him that it would continue paying him only half his salary during his extended sick leave. He lodged a complaint with the Tribunal on 27 November. On 13 December 2000 he resumed work half-time.

The complainant filed further submissions with the Tribunal on 19 January 2001. The same day he sent a copy of them to the President of the Office contesting the decision of 20 November 2000. In an accompanying letter he asked if the President would waive the internal appeal process and allow his direct appeal to the Tribunal. In the event of his request being denied he wanted his submissions to be treated as a new internal appeal.

B. Taking up the matter of his first appeal, the complainant submits that he had a "clear legal interest" in contesting the Office's persistent refusal to allow him to devote more than 50 per cent of office time to Staff Committee work. The medical officer's opinion was that such duties constituted a suitable way of allowing him to eventually return to work full-time. In placing him unlawfully on compulsory sick leave and by refusing to allow the gradual return to work envisaged by his doctors the EPO was in breach of its duty of care towards him and thereby caused him moral injury.

Turning to his other two appeals, he says that by correcting the date on which the statutory period of sick leave on full pay expired the impugned decision gave him only partial satisfaction. At no time since 22 January 1999 has a medical adviser expressed the opinion that his condition requires compulsory sick leave. The decision to put him on such leave was taken in haste. The Office again breached its duty of care by failing to consult the medical officer prior to taking the decision. Nor was he himself heard before the decision took effect. He claims he suffered moral injury. His condition worsened owing to delays in both the Appeals Committee and Invalidity Committee procedures. He pleads breach of equal treatment in that three other officials having a similar disability were not placed on compulsory sick leave. In his opinion, the EPO discriminated against him on account of his being a staff representative.

The complainant seeks the following redress: (1) the quashing of the decision denying his request to work for more than 50 per cent of office time on Staff Committee work; (2) the quashing of the decision to place him on compulsory sick leave; (3) the "implementation" of the opinion expressed in the Invalidity Committee's report of 6 March 2000 that he is suffering from a serious illness within the meaning of Article 62(7), and the payment, with interest, of sums withheld since 11 May 1999; (4) compensation for loss of entitlement to promotion, annual leave and home leave; (5) moral damages for discrimination against him and for delays and "mistakes" in the proceedings before the Appeals Committee as well as the Invalidity Committee; and (6) costs.

In his additional submissions the complainant states that in November 2000, just a matter of days before the expiry time for filing a complaint with the Tribunal, the Invalidity Committee issued what the Administration was treating as a "final" report on his case. He argues that the question of whether his illness constitutes a "serious illness" under the terms of Article 62(7) is crucial to his complaint. If it does, then he was entitled to receive his full salary for the whole period during which he was 100 per cent unfit for work after the expiration of his maximum sick leave on 11 May 1999. In his view uncertainty arose among the members of the Invalidity Committee because the question at issue was incorrectly phrased on the pre-printed form they had to fill in when examining his case; it did not properly reflect Article 62(7). Again the EPO violated its duty of care and the procedure before the Invalidity Committee was unnecessarily prolonged. He suffered material loss through being on half pay during that time. He gives details of what he perceives to be other procedural errors in the Invalidity Committee proceedings, for which he claims moral and material damages.

C. The Organisation takes the view that the complaint is irreceivable in part and is also devoid of merit. It is receivable only insofar as the complainant impugns the decision to reject his first internal appeal. The EPO construes the further submissions he filed as a change of the relief sought in his third internal appeal relating to the expiry date of the statutory period of sick leave on full pay. It adds that it did not allow the complainant's request to file his new appeal directly with the Tribunal.

The EPO maintains that his first internal appeal showed no cause of action. Moreover, the complainant had been declared 75 per cent fit, so to devote 75 per cent of office time to staff representation duties would have meant working at 100 per cent of his total capacity. His claim became devoid of merit on 2 March 1999 when he was found to be 100 per cent unfit for work. Even if the medical officer found that staff representation work would be suitable for the complainant, such an opinion was not binding on the EPO.

With regard to his second appeal - against the decision to put him on compulsory sick leave - it argues that since he impugned a decision dated 28 January 1999 and he was found to be 100 per cent unfit for work on 2 March 1999, his appeal could only concern that period. The President endorsed the Appeals Committee's recommendation to allow a recalculation of the end date of the twelve-month period of sick leave on full pay; that amounted to a *de facto* quashing of the decision to put the complainant on compulsory sick leave. The part of his complaint based on that appeal has become devoid of subject matter. The part based on his third appeal is irreceivable for it shows no cause of action. The correct date for the end of the twelve-month period of sick leave on full pay was 11 May 1999. The Office paid him the corresponding sums due.

His claims to the implementation of the report of 6 March 2000 and to loss of entitlement to promotion are unacceptable extensions of his third internal appeal and as such are irreceivable. The EPO points out that the report of 6 March was only "provisional". The three members of the Invalidity Committee decided to consult a fourth practitioner, which ultimately led to the report of November 2000 - the only "valid" report. There are no grounds for an award of moral damages. None of the alleged flaws in the Invalidity Committee proceedings are founded and the internal appeals procedure was carried out within a reasonable time frame. It denies that there was inconsistency in the wording of the form given to the doctors on the Invalidity Committee. His allegation of discrimination lacks credibility, and he was not the victim of unequal treatment.

D. In his rejoinder the complainant contests several arguments put forward by the Organisation and maintains his pleas and his claims for relief. He argues that there was justification for allowing direct appeal to the Tribunal since the requirement for filing an internal appeal does not apply to decisions taken after consultation of the Invalidity Committee.

E. In its surrejoinder the Organisation maintains in full the submissions it made in its reply. Given that the complainant argues that there were flaws in the Invalidity Committee's reporting proceedings, prior consultation of the Appeals Committee was deemed necessary.

CONSIDERATIONS

1. The complainant challenges the decision of 29 August 2000 of the President of the European Patent Office, which disposed of three internal appeals brought by the complainant. The appeals arose as follows:

(a) On 10 June 1997 the complainant was diagnosed with repetitive strain injury (RSI). On 24 November 1998 the Office's medical officer found him to be fit to work 75 per cent of normal working hours provided he did not have to use his hands. The same day he sought authorisation to work at 75 per cent for the Staff Committee, of which he was a member. The refusal of this request led to internal appeal RI/121/98.

(b) On 27 January 1999 the medical officer further advised that the complainant was 75 per cent fit for work, but with a 100 per cent incapacity to use his hands (mentioning that he could not use a mouse or keyboard, nor lift or leaf through files, or turn pages). On the basis of this report the Office informed the complainant on 28 January 1999 that, as it considered him to be completely unable to perform his duties, he was on compulsory sick leave as from that date. This decision led to an internal appeal registered as RI/62/99.

(c) On 6 April 1999 the complainant was informed that on 16 April he would reach the maximum period of sick

leave on full pay (twelve months), and that pursuant to Article 62(6) and (7) of the Service Regulations he would with effect from 17 April 1999 receive, during his extended sick leave, only half of his basic salary, plus full allowances. The complainant was asked to appoint a doctor of his choice for the Invalidity Committee, which in due course he did. On 3 July 1999, the complainant lodged an internal appeal against the decision of 6 April. It was registered as RI/79/99.

2. The Invalidity Committee issued a report dated 6 March 2000. A further report with different conclusions was issued in November 2000. The parties disagree as to the validity and meaning of these two reports. The reports were issued long after the dates of the complainant's internal appeals which form the basis of the present complaint, and thus are beyond the scope of the present judgment. Since these reports might be at issue in a pending internal appeal, the Tribunal will refrain from any comment on them.

3. The Appeals Committee unanimously recommended on 5 July 2000 rejecting appeal RI/121/98 as devoid of substance and allowing appeals RI/62/99 and RI/79/99 to the following extent: the Office should recalculate the end of the maximum period of sick leave on full pay, as the decision to put the complainant on compulsory sick leave was not correct; and it should pay him any sums erroneously withheld. It also recommended reimbursing the complainant, to the extent that his appeals succeeded, the costs he incurred in the appeals procedure.

4. By a letter dated 29 August 2000 the President informed the complainant that he had decided to follow the unanimous recommendation of the Appeals Committee and reject appeal RI/121/98 as without substance, and give satisfaction to the other two appeals by recalculating the date on which his extended sick leave began (it would begin on 11 May 1999 instead of 17 April) and refunding the part of his salary withheld, plus interest. That is the impugned decision.

5. On 12 December 2000 the Office's medical officer certified that the complainant was fit to return to work on a 50 per cent basis. The complainant did so the following day.

6. The complainant argues that the decision which was the subject of internal appeal RI/121/98 was unlawful because it did not take into account Article 34(2) of the Service Regulations which provides that the "duties undertaken by members of the Staff Committee ... shall be deemed to be part of their normal service".

7. As regards the decisions which were the subject of appeals RI/62/99 and RI/79/99, the complainant urges that his medical condition did not warrant the decision to place him on compulsory sick leave. To the extent that this argument calls for the interpretation of the medical officer's report of 27 January 1999, the complainant has not shown that the Organisation was wrong to consider that a complete inability to use his hands for any purpose whatsoever amounted, in his case, to a total disability. To the extent that he contests the correctness of that report, the Tribunal considers that it is a medical question which can only be determined by the Invalidity Committee. The balance of the complainant's arguments with regard to these two internal appeals is devoted entirely to matters relating to the alleged flaws in the proceedings and conclusions of the Invalidity Committee and to alleged delays in the internal appeals procedure.

8. It is clear that the complaint as pleaded is irreceivable insofar as it relates to the decisions giving rise to these last two appeals. If the complainant still has grievances regarding the proceedings before the Invalidity Committee - which appears to be the case since in his further submissions he queries the role and status of some members of the Committee, whether it is the report of March 2000 or that of November 2000 which can be acted upon and whether either report is vitiated by defects of form or substance - then he must exhaust his internal remedies by way of a valid internal appeal. His arguments raise serious issues of fact on which the Tribunal will not rule until it has had the benefit of the views of the internal appeals body. His claims for moral damages resulting from these matters are likewise irreceivable in the context of the present complaint.

9. As for the complainant's claim regarding the decision which led to internal appeal RI/121/98, it is without merit. In the first place, the complainant misinterprets the medical officer's report which does not, as the complainant suggests, state that he is fit to perform Staff Committee duties. In fact, the medical officer only enumerated the activities which the complainant could perform (reading without turning pages, speaking at meetings and training sessions or any activity not requiring the use of his hands), and concluded that the complainant could only gradually resume his work as an examiner over a long period of time. The report was silent on whether he could perform staff representation duties. The Tribunal cannot, on the evidence it has before it, conclude whether or not the complainant could have carried out such duties. The complainant, therefore, has not discharged the burden of

proof.

10. Although he refers to Article 34(2) of the Service Regulations which provides that work for the Staff Committee shall count as part of "normal service", the complainant overlooks the fact that that provision has for many years consistently and correctly been interpreted - and applied by the EPO - as preserving its own right to direct the work of the staff. The Organisation's intention was clear from a letter of 12 June 1979 from the President of the Office to the Chairman of the Central Staff Committee (CSC), which read as follows:

"The staff committees may divide up [time allocated for staff representation] among their members or other employees (experts) as they see fit, subject to the following proviso: no employee may be released for more than 50% of his normal duties apart from the CSC chairman, who may be released for up to 75%."

A similar provision was later incorporated into the Service Regulations.

11. The complainant was not chairman of the Staff Committee. In addition, since he was only fit to work 75 per cent of normal hours, his request to work at 75 per cent on staff committee duties was in fact a request to devote 100 per cent of office time to that function. As such it was manifestly inadmissible.

12. The complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2002.